

From: Brett Glass
To: Microsoft ATR
Date: 1/15/02 1:20pm
Subject: Microsoft Settlement

January 15, 2002

Attn: Renata B. Hesse
Antitrust Division
U.S. Department of Justice
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To whom it may concern:

The proposed settlement in US v. Microsoft/State of New York et al v. Microsoft has shaken my personal faith in the integrity and competence of the US Department of Justice. It is not at all in the public interest and hence should be roundly rejected by the Court.

The proposed settlement is riddled with loopholes which would allow Microsoft to continue many of its existing anticompetitive practices and to begin engaging in new ones. For example, Section IV, Paragraph U of the proposed settlement states,

The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

This clause allows Microsoft the ability to engage in the anti-competitive practice of "bundling" merely by claiming that a product distributed for the sole purpose of destroying markets or businesses is part of Windows.

Likewise, Section III, Paragraph J of the proposed settlement states:

J. No provision of this Final Judgment shall:

1. Require Microsoft to document, disclose or license to third parties:
 - (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria;
 - or (b) any API, interface or other information related to any Microsoft product if lawfully directed not to do so by a governmental agency of competent jurisdiction.
2. Prevent Microsoft from conditioning any license of any API, Documentation

or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

This paragraph would allow Microsoft to make any number of excuses for failure to disclose its APIs and communications protocols to any competitor. For example, clause 1(a) would permit Microsoft to claim that its protocols had to remain secret for security reasons, even if the alleged security problems were due to bugs in Microsoft's own software. Clause 2(a) could allow Microsoft to condition the release of information on an intrusive and disruptive license audit of the recipient's premises. Clause 2(c) would prevent access by groups which developed software collaboratively rather than as part of a formal business. Clause 2(d) could allow Microsoft to delay the release of competitive products, obtain advance information regarding competitors' product plans, and/or create barriers to market entry by imposing prohibitively expensive testing requirements.

These are only some of the immense and egregious defects in the proposed settlement which would allow the company to continue to engage in the anti-competitive practices which motivated the filing of this case. The fact that there are so many defects in the proposed settlement has raised suspicion among members of the general public that it was politically motivated; that it was authored by, and/or for the benefit of, Microsoft; and that it represents the fruits of Microsoft's infinitely deep legal war chest and lobbying power rather than anything remotely resembling a remedy.

The Court would be remiss in its responsibility to protect the public interest, and would permanently impact Americans' faith in government and in our free enterprise system, if it accepted this settlement rather than directly and quickly addressing the ongoing anti-consumer and anti-competitive practices described so eloquently by Judge Thomas Penfield Jackson. The Court should roundly and firmly reject the proposed settlement and instead impose conduct and/or structural remedies that have at least a reasonable chance of success.

Sincerely,

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